JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	YAP -v- MATIC [No 6] [2023] WASC 24
CORAM	**:**	ARCHER J
HEARD	**:**	3 FEBRUARY 2023
DELIVERED	**:**	3 FEBRUARY 2023
FILE NO/S	**:**	CIV 1106 of 2022
BETWEEN	**:**	VIVIEN JIT SIEN YAP First Plaintiff EMPIRE SONS (AUSTRALIA) PTY LTD T/AS RAY WHITE (DALKEITH CLAREMONT) Second Plaintiff AND SANDI MATIC Defendant

Catchwords:

Contempt - Conduct had the tendency to interfere with the course of justice - Appropriate penalty - Indemnity costs - Imprisonment unless fine and costs paid

Legislation:

Nil

Result:

Defendant ordered to serve three months imprisonment, such order not to be executed if, by 16 February 2023, the defendant pays a fine of $9,000 and costs of $10,854.

Category: B

Representation:

Counsel:

First Plaintiff	:	M L Bennett
Second Plaintiff	:	M L Bennett
Defendant	:	No appearance

Solicitors:

First Plaintiff	:	Bennett
Second Plaintiff	:	Bennett
Defendant	:	Not Applicable

Case(s) referred to in decision(s):

Allbeury v Corruption and Crime Commission [2012] WASCA 84; (2012) 42 WAR 425
Brookvista Pty Ltd v Meloni [2009] WASCA 180
Caratti v Boban Pty Ltd (Administrators Appointed) [No 2][2015] WASC 139
Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd [2015] HCA 21; (2015) 256 CLR 375
Dental Board of Australia v Traianou [2011] WASC 293
Flotilla Nominees Pty Ltd v Western Australian Land Authority [2003] WASC 122 (S); (2003) 28 WAR 95
Guerinoni Nominees Pty Ltd v Cullen [2022] WASC 337
Infa-Secure Pty Ltd v Crocker (No 2) [2016] FCA 202
Johnson v Denwest Nominees Pty Ltd t/as Cunderdin Roadhouse [2017] WASCA 200
Kazal v Thunder Studios Inc (California) [2017] FCAFC 111
Kennedy v Lovell [2002] WASCA 226
R v T [2022] WASCA 34
Re Colina; Ex parte Torney [1999] HCA 57; (1999) 200 CLR 386

Swansdale Pty Ltd v Whitcrest Pty Ltd [2010] WASCA 129 (S)
The Owners of the Wills Building Strata Plan 38579 v Coleman [2018] WASC 219
Truong v The State of Western Australia [2020] WASCA 177
Witham v Holloway [1995] HCA 3; (1995) 183 CLR 525
Yap v Matic [No 4] [2022] WASC 422
Yap v Matic [No 5] [2023] WASC 15

ARCHER J:

(This judgment was delivered extemporaneously on 3 February 2023 and has been edited to correct matters of grammar and language, include references, and add formatting.)

Introduction

1 On 30 January 2023, I found Sandi Matic guilty of criminal contempt. His conduct was sending an email on 16 August 2022 to four staff members of the plaintiffs' solicitors, the Chief Justice and Justice Solomon of this Court, copied to various members of Parliament (**August Email**).

2 In my judgment delivered on that day, I explained why.[1] That judgment should be read with these reasons. However, for convenience, I will repeat or summarise some of the matters I outlined in that judgment.

3 The August Email accused the plaintiffs' solicitors of 'committing fraud & submitting altered, manipulated and fabricated files & recordings that you know to be unauthentic and altered in order to obtain a benefit by deception for yourselves personally & for your client'.

4 The August Email asserted, among other things, that the electronic material said to be recordings of conversations between Mr Matic and a Mr Angus Mead[2] had been fraudulently created. From the context as a whole, the only reasonable construction of the August Email is that it alleged that the plaintiffs had created the fraudulent recordings and supplied them to their solicitors, and that the solicitors (knowing they were fraudulent) then provided them to Mr Matic.

5 Mr Matic wrote in the August Email that the email should be considered to be a notice of intention to report a crime to various authorities. From the context as a whole, the only reasonable construction of this is that Mr Matic intended to allege to those authorities that both the plaintiffs and their lawyers committed a crime.

6 I was satisfied beyond reasonable doubt that, objectively construed, the August Email had a tendency to deter the plaintiffs from continuing their action against the defendant. The practical effect of

[1] ***Yap v Matic [No 5]*** [2023] WASC 15.
[2] Mr Mead was the national relationship manager for the Ray White Group.

the August Email was to put the plaintiffs and their solicitors on notice that the author was willing to disseminate serious allegations against the plaintiffs and their lawyers to judicial officers and members of Parliament, and intended to make those serious allegations to various authorities.

7 I considered that this amounted to improper pressure. The allegations were extremely serious and expressed in emphatic terms. They were disseminated beyond the plaintiffs and their lawyers, to politicians and judicial officers.

8 Given those circumstances, I was satisfied beyond reasonable doubt that the August Email had the tendency to deter the plaintiffs, improperly, from persisting in their action against the defendant.

9 Having found Mr Matic guilty of contempt, I fixed the penalty hearing for today.

10 Mr Matic elected not to attend.

11 What follows sets out my reasons in relation to the appropriate penalty to be imposed.

Criminal contempt[3]

12 There is a distinction between civil and criminal contempt of court. The differences upon which the distinction is based have been described as illusory in significant respects.[4] Further, there is little practical difference between the two - both require proof beyond a reasonable doubt,[5] but both are civil proceedings.[6]

13 The distinction was summarised by Brennan, Deane, Toohey and Gaudron JJ in ***Witham v Holloway***[7] (footnotes omitted):

> In general terms, the distinction between civil and criminal contempt is that a civil contempt involves disobedience to a court order or breach of an undertaking in civil proceedings, whereas a criminal contempt is

[3] What follows draws upon or reproduces parts of my judgment in ***The Owners of the Wills Building Strata Plan 38579 v Coleman*** [2018] WASC 219.
[4] ***Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd*** [2015] HCA 21; (2015) 256 CLR 375 [42] (***Boral***), citing ***Witham v Holloway*** [1995] HCA 3; (1995) 183 CLR 525, 534. See also ***Allbeury v Corruption and Crime Commission*** [2012] WASCA 84; (2012) 42 WAR 425 [61] - [64].
[5] ***Allbeury*** [64] (Buss JA, as his Honour then was). This applies also to contempt under s 98 of the *Civil Judgments Enforcement Act 2004* (WA); ***Caratti v Boban Pty Ltd (Administrators Appointed) [No 2]***[2015] WASC 139 [85] (Mitchell J, as his Honour then was).
[6] ***Boral*** [40] - [45], [66]; ***Allbeury*** [9], [182] and [204].
[7] ***Witham v Holloway*** [1995] HCA 3; (1995) 183 CLR 525, 530. See also Nettle J in ***Boral*** [65].

> committed either when there is a contempt in the face of the court or there is an interference with the course of justice. However, disobedience or breach of an undertaking amounts to a criminal contempt if it involves deliberate defiance or, as it is sometimes said, if it is contumacious.

Penalty options

14 Order 55 rules 7 and 8 of the *Rules of the Supreme Court 1971* (WA) provide:

> 7. **Punishing contemnors**
>
> (1) The Court may punish contempt of court by committal of the contemnor to prison, or by imposing a fine on him, or by both committal and fine.
>
> (2) When the Court imposes a fine, it may order that the contemnor be imprisoned, or further imprisoned, until the fine is paid.
>
> (3) Where the contemnor is a corporation the Court may punish contempt of court by sequestration, or fine or both.
>
> (4) An order of committal may be in Form No. 66.
>
> 8. **Execution of committal order may be suspended**
>
> The Court making an order of committal may by order direct that the execution of the order of committal shall be suspended for such period or on such terms or conditions as the Court thinks fit.

15 It can be seen from rule 7 that there is no maximum penalty.[8]

Legal principles in punishing contempt

16 The cardinal feature of the power to punish for contempt is that it is an exercise of judicial power by the courts to protect the due administration of justice.[9] The importance of contempt cases transcends each individual case because they support and enhance the integrity of judicial proceedings in general.[10]

17 The range of circumstances giving rise to contempt means there is

[8] And see ***Dental Board of Australia v Traianou*** [2011] WASC 293 [39].
[9] ***Boral*** [41], endorsing Hayne J in ***Re Colina; Ex parte Torney*** [1999] HCA 57; (1999) 200 CLR 386 [112].
[10] ***Kazal v Thunder Studios Inc (California)*** [2017] FCAFC 111 [97].

no tariff or sentencing range.[11]

18 The *Sentencing Act 1995* (WA) does not apply to punishment for contempt.[12] However, it is appropriate to have regard to the general principles set out in s 6 of that Act.[13] In particular, the punishment should be commensurate with the seriousness of the conduct. This reflects the common law principle that a sentence should be proportionate to the offence.[14] Further, imprisonment should not be imposed unless the seriousness of the conduct is such that imprisonment is the only appropriate disposition.

19 It is also appropriate to have regard to the factors that are ordinarily relevant to the punishment of criminal offences.[15]

20 There is no closed list of factors that are relevant to the determination of the appropriate disposition.

21 The Full Court of the Federal Court in ***Kazal v Thunder Studios Inc (California)***[16] helpfully endorsed a non-exhaustive list of factors that may be relevant in any given case:

1. the seriousness of the contempt proved;
2. the contemnor's culpability;
3. the reason or motive for the contempt;
4. whether the contemnor received, or tried to receive, a benefit from the contempt;
5. whether there has been any expression of genuine contrition by the contemnor;
6. the character and antecedents of the contemnor;
7. the contemnor's personal circumstances;
8. personal and general deterrence; and
9. the need for denunciation of contemptuous conduct.

[11] ***Allbeury*** [251].
[12] *Sentencing Act 1995* (WA) s 3(3)(a).
[13] ***Kennedy v Lovell*** [2002] WASCA 226 [6]; ***Dental Board of Australia*** [40].
[14] ***Truong v The State of Western Australia*** [2020] WASCA 177 [21] (Buss P), [82] (Mazza and Beech JJA).
[15] ***Allbeury*** [218]; ***Kennedy*** [7].
[16] ***Kazal*** [101] - [102]. See also ***Allbeury*** [216] - [218], [255] and ***R v T*** [2022] WASCA 34.

22 The Full Court noted, however:[17]

> The focus remains on the core themes of the objective seriousness of the conduct and, in particular, its effect on the administration of justice, subjective factors such as the contemnor's culpability, antecedents and attitude, including in particular any apology or other palpable sign of contrition, the capacity to pay a fine, and imprisonment being a last resort. Deterrence remains a dominant theme, both specific and general. Even denunciation and punishment can be seen as bolstering deterrence. That is especially so when the conduct entails contemplation and the opportunity to reflect and desist.

23 Each of the factors in the Full Court's list will involve consideration of numerous matters.

Analysis of relevant considerations on the facts

24 The contempt was serious by its nature. Mr Matic's conduct had a real tendency to interfere with the administration of justice.

25 In relation to Mr Matic's culpability, the August Email was lengthy and wide-ranging. It would have taken considerable time to write. He did not confine the recipients to the plaintiffs and their lawyers. His accusations were serious and expressed in emphatic terms. On the other hand, the contempt involved a single email.

26 I am satisfied beyond reasonable doubt that Mr Matic's motive was to attempt to deter the plaintiffs from continuing with the substantive proceedings. Had he simply sent an abusive email to the plaintiffs' solicitors, I could not exclude the reasonable possibility that his intention was simply to denigrate and upset the plaintiffs and their solicitors. Further, in copying the August Email to local politicians, it is reasonably possible that his intention was simply to cause reputational harm to the plaintiffs. However, when the abusive content and broad circulation is combined with the giving of notice of an intention to allege to various authorities that the plaintiffs and their lawyers had committed a crime, I consider that the only reasonable inference is that he was seeking to deter the plaintiffs from continuing with the substantive proceedings.

27 Mr Matic did not benefit from his conduct in any tangible sense. The plaintiffs were not deterred. In the circumstances, I do not consider this to be mitigating. Rather, it is an absence of an aggravating feature.

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[17] ***Kazal*** [103].

28 Mr Matic has not apologised and shows no signs of doing so. His conduct before me has been inconsistent with any remorse.[18] Accordingly, the mitigating factor of remorse is not applicable.

29 Mr Matic has not given me any information as to his character, antecedents, or personal circumstances. However, I have read the affidavits that Mr Matic filed in relation to the matters before Solomon J. From these, the following appears.

30 Mr Matic and his wife were joint owners of a house that Mr Matic had built as an owner/builder, after the registered builder they had hired went into administration.[19] (An affidavit filed by Ms Yap[20] shows that the house was contracted to be sold for $1.7 million, subject to finance).

31 Mr Matic said he is self-employed and operates a few different businesses in various industries.[21]

32 Mr Matic's affidavits do not provide any information about his actual financial circumstances or other matters of mitigation.

33 If a court decides to fine an offender for an offence to which the *Sentencing Act* applies, the *Sentencing Act* requires the court to take into account, as far as is practicable, the means of the offender and the extent to which the payment of the fine would burden the offender.[22] The *Sentencing Act* does not apply to contempts. Nevertheless, I would have had regard to those matters, had I been able to obtain them. Unfortunately, Mr Matic's decision to dissociate himself from these proceedings has prevented me from obtaining that information.

34 My only direct experience of Mr Matic was on 24 January 2023. As I observed in my judgment delivered on that day, it was plain that Mr Matic is not unsophisticated or unintelligent.[23]

35 Although Mr Matic has been convicted by Solomon J of two contempts, both convictions occurred after he sent the August Email, and should be disregarded. In the absence of any information to the contrary, I will assume that, this current offence aside, he is a person of good character.

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[18] See ***Yap v Matic [No 5]*** [29] - [43].
[19] A 19 page affidavit of Sandi Matic dated 2 March 2022 [7] - [8] (**Second Matic Affidavit**).
[20] Affidavit of Vivien Jit Sien Yap filed 10 February 2022 [36].
[21] Second Matic Affidavit [3].
[22] Section 53 of the *Sentencing Act*. And see ***Guerinoni Nominees Pty Ltd v Cullen*** [2022] WASC 337 [163] - [165].
[23] ***Yap v Matic [No 5]*** [43].

36 The need for general deterrence will ordinarily be important in cases of contempt. It is in this case. It is important to send a message that litigants may not engage in conduct which has the tendency to interfere with the course of justice.

37 There is nothing about this case that would make general deterrence of less weight than would ordinarily be the case.

38 The need for personal deterrence is also important in this case. Mr Matic shows no sign that he accepts he should not have sent the August Email.

39 There will ordinarily be a need to denounce contempt, as an aid of deterrence. There is a need in this case. It is important to reinforce that litigants may not engage in conduct which has the tendency to interfere with the course of justice, no matter how aggrieved or angry they feel.

Is imprisonment appropriate?

40 In ***Yap v Matic [No 4]***,[24] Solomon J ordered Mr Matic to pay the plaintiffs' costs of the proceedings in relation to the March 2022 Contempt on an indemnity basis, fixed in the amount of $16,057.00, payable forthwith. Solomon J made this order on 7 December 2022 in the presence of Mr Matic. The costs have not been paid.[25]

41 In my view, the seriousness of the contempt and the need for both general and personal deterrence means that imprisonment is the only appropriate option. For the same reasons, I consider that a fine should also be imposed.

42 That said, I consider that the seriousness of the contempt would be adequately reflected in, and the need for both general and personal deterrence achieved by, a sentence of imprisonment the execution of which is suspended on the condition that Mr Matic pays the fine I will impose and the costs I will award.

43 I will deal first with the quantum of costs. This is because the quantum of costs should be taken into account in determining the appropriate length of imprisonment and amount of the fine.

Indemnity costs

44 The plaintiffs seek indemnity costs in the sum of $10,854.

[24] ***Yap v Matic [No 4]*** [2022] WASC 422.
[25] Third Affidavit of Thomas Anthony Coltrona filed 23 January 2023.

45 The relevant principles to be applied were summarised in ***Swansdale Pty Ltd v Whitcrest Pty Ltd***.[26]

46 In particular, I should not make an order for indemnity costs unless there is some special or unusual feature in the case. If the justice of the case requires an order for indemnity costs, I have a discretion as to whether to make such an order.[27]

47 An indemnity costs order may not be appropriate if the costs would be recoverable by a properly formulated special costs order.

48 There is no general principle or rule of law that indemnity costs should be ordered in contempt cases. However, in some jurisdictions at least, it is common for such orders to be made.[28] One reason for this is that the applicant is performing both a private and public service in prosecuting the contempt.[29]

49 In my view, Mr Matic's conduct of the litigation is also relevant. In my primary judgment, I set out the manner in which Mr Matic had behaved in these proceedings.[30] In my view, he decided to advance meritless contentions as to his identity and the proceedings in an attempt to avoid being held accountable. Having regard to his changing behaviour over time, I consider this is an irresistible inference. I consider it is a special feature of this case that could warrant an order for indemnity costs.

50 I consider that an indemnity costs order should be made. Mr Matic's contempt was serious, and his conduct of the proceedings was obstructive.

51 The plaintiffs seek that the costs be fixed and made payable forthwith.[31]

52 The plaintiffs have provided to the court a schedule of costs[32] in relation to this application. The schedule describes the work done, and identifies the date of such work and the cost incurred. In view of the

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[26] ***Swansdale Pty Ltd v Whitcrest Pty Ltd*** [2010] WASCA 129 (S) [10].
[27] ***Flotilla Nominees Pty Ltd v Western Australian Land Authority*** [2003] WASC 122 (S); (2003) 28 WAR 95 [8] - [9], endorsed in various Court of Appeal decisions, including ***Swansdale Pty Ltd v Whitcrest Pty Ltd*** [2010] WASCA 129 (S) [10] and ***Johnson v Denwest Nominees Pty Ltd t/as Cunderdin Roadhouse*** [2017] WASCA 200 [112].
[28] See the discussion in ***Kazal*** [192] - [195].
[29] ***Infa-Secure Pty Ltd v Crocker (No 2)*** [2016] FCA 202 [44].
[30] See ***Yap v Matic [No 5]*** [29] - [43].
[31] Pursuant to O 66 r 10(1) of the *Rules of the Supreme Court.*
[32] Filed 1 February 2023.

confined nature of this particular contempt application, and the fact that I have direct knowledge of the product achieved by the work done, I consider that the schedule provides sufficient material to enable me to feel confident that I can fairly arrive at an appropriate sum.[33] The amounts claimed for each component are entirely reasonable. I will order that Mr Matic pays the plaintiffs' costs of these contempt proceedings on an indemnity basis, fixed in the amount of $10,854.

Appropriate disposition

53 I take into account that Mr Matic will be required to pay the plaintiffs' costs on an indemnity basis in the sum of $10,854. This contributes to deterrence.

54 The *Sentencing Act* does not apply to contempt offences. Accordingly, it is open to me to impose a sentence of less than six months.

55 In determining the quantum of a fine, it is appropriate to take into account the means and the extent to which a fine will burden the contemnor.[34] Mr Matic has not provided me with that information.

56 I consider that the appropriate proportionate sentence is a term of imprisonment for three months, with the execution of that sentence suspended on the condition that Mr Matic pays a fine of $9,000 and the costs of $10,854 by 16 February 2023, or within such further time as the court may order. If Mr Matic pays the fine and the costs by 16 February 2023, he will not be imprisoned.

57 I will also order that, if he is imprisoned for not paying the fine and the costs, he will be discharged from prison before the term expires if he pays whatever remains unpaid.

Orders

58 I would make the following orders:

1. Subject to order 2 and any further order of the Court, Sandi Matic is sentenced to three months imprisonment for the contempt (**order of committal**).

[33] ***Brookvista Pty Ltd v Meloni*** [2009] WASCA 180 [27] (Buss JA, as his Honour then was, and Newnes JA).
[34] Section 53(1) *Sentencing Act* and ***Kennedy*** [40].

2. The order of committal shall not be executed if, by 16 February 2023, Sandi Matic pays:

    a. a fine of $9,000 to the Supreme Court of Western Australia; and

    b. costs of $10,854 to the plaintiffs' solicitors.

3. The plaintiffs' solicitors are to advise my associate by email within 18 hours of the costs being paid.

4. Sandi Matic is to advise my associate, by email if possible, as soon as possible after paying the fine to the Court.

5. Sandi Matic is to advise my associate, by email if possible, as soon as possible after paying the costs to the plaintiffs' solicitors.

6. A further hearing will be held in this Court at 10 am on 17 February 2023.

7. Sandi Matic is required to attend that hearing.

8. If Sandi Matic is imprisoned due to the operation of orders 1 and 2, and subsequently pays the fine and the costs, he may make an application to this Court to be discharged from custody.

9. Sandi Matic may, at any time prior to 17 February 2023, request a hearing before the Court to make an application that these orders be varied, by sending an email to my associate or by telephoning my associate, or by any other means.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

NL
Associate to the Judge

9 FEBRUARY 2023